

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 134 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

RATNAVHAI RAMABHAI

Versus

STATE OF GUJARAT

Appearance:

MS BANNA S DUTTA for Appellant
MR MA BUKHARI APP for Respondent

CORAM : MR.JUSTICE B.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 14/08/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

#. Appellant came to be convicted for an offence punishable under Sec. 15 of the Narcotics Drugs & Psychotropic Substances Act, 1985 (hereinafter to be referred to as "the NDPS Act") and was sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 1.00 lac (in default, to undergo rigorous imprisonment for 2 years), by virtue of the judgment and order rendered by Additional Sessions Judge, Sabarkantha at Himmatnagar in N.D.P.S. Case No. 1/96.

#. Facts leading to the present appeal can be stated in brief as under. Head Constable Jashwantsinh Fatesinh of Modasa Town Police Station received secret information from an informer on October 23, 1995 that a person is approaching Modasa S.T. Stand with an intoxicating substance. He therefore, informed the Police Sub Inspector about the information, who in turn, informed the Circle Police Inspector Mr. Zala. Panch witnesses were summoned and a watch was arranged at the S.T. Stand along with certain police personnel. They noticed one person approaching the S.T. Stand with a jute bag on his head. He was, therefore, accosted and his identity was inquired into. He stated that he is Ratnabhai Ramabhai Vanzara, residing at Chibhdi Anta (Kaanta), Taluka Bhiloda. He was informed that he is to be searched and therefore, whether he would like to be taken to a gazetted officer or a Magistrate in whose presence he could be searched. He stated that he has no objection if he is searched in the presence of the Circle Police Inspector (C.P.I.). On search of the jute bag, poppy straws along with a bottle of country made foreign liquor were found. He did not have any pass or permit for possessing the said poppy straws or the liquor. One Prakashkumar Shyamkumar Sindhi was summoned, who weighed the contraband seized. Net weight of the poppy straws was 3 Kgs. 870 grams. Sample of 250 grams of poppy straws was taken out of the quantity seized and proper packing and sealing was done. A slip containing signatures of the panch witnesses was placed at the time of sealing and seal of P.S.I. Modasa Town was affixed. Panchnama in this regard was drawn. A complaint was lodged and an offence was registered. The sample was sent to the Forensic Science Laboratory for analysis and on analysis, it was found that the material found and seized was poppy straws - a contraband article. Chargesheet was filed and the trial court framed charge against the accused at exh. 8 for the offence punishable under Section 15 of the NDPS Act. The accused pleaded not guilty to the charge and claimed to be tried. Learned Additional Sessions Judge, after considering the evidence on record came to a conclusion that the charge

was proved and recorded conviction sentencing the accused appellant for the offence as stated above.

#. Learned advocate Ms. Banna Datta, appearing for the appellant has taken us through the record and proceedings as well as the judgment and order impugned herein. She submitted that the panch witnesses have not supported the prosecution case. She also submitted that the witness who is said to have weighed the contraband has also not supported the prosecution case. It is a matter of doubt whether weighment was done at the very place or at a place nearby and, therefore, the possibility of tampering with the muddamal article cannot be ruled out. The second fold of her submission is that there is not sufficient compliance of requirement of Sec. 50 of the NDPS Act, namely informing the accused of his right of being searched in the presence of a gazetted officer or a Magistrate. It is also contended by her that there is non-compliance of mandatory requirements of Sec. 42 of the NDPS Act. She, therefore, urged that these aspects being not properly considered by the trial court, this appeal may be allowed and conviction be set aside.

#. Mr. M.A. Bukhari, learned APP has opposed this appeal. He has drawn attention of this Court to the fact that there is ample evidence in the deposition of the police witnesses to lend support to the prosecution case. It is not the case of the defence that the police personnel had any animosity with the accused and as such, in the absence of any dispute, the police officers had no reason to falsely implicate the accused. Mr. Bukhari submitted that if the evidence is seen, there is sufficient, proper and adequate compliance of Sec. 50 of the NDPS Act, and, therefore, the appeal may be dismissed and consequently, the judgment and order impugned herein be confirmed.

#. We have ourselves taken a close look at the evidence on record. The panch witness - Arvindkumar Bhagvandas - Exh. 12 has not supported the prosecution case and has been declared hostile.

#. PW 2 - Jashwantsinh Fatesinh, Head Constable who had received the secret information has been examined at Exh. 16. He states that he received the information and passed it over to Police Sub Inspector who had called the panch witnesses. While other P.S.I. Mr. Vaghela, Police Inspector Mr. Zala, Head Constable Ratansinh, Police Constables Dineshkumar and Sukhdevsinh Shambhudan etc. were keeping watch at the S.T. Stand, the accused came, he was accosted and he was asked that he is to be

searched for narcotic drug and that if he wanted, he could be searched before a gazetted officer or a Magistrate. But he stated that if he is searched before the Circle Police Inspector, he has no objection and ultimately, contraband was found. It was weighed and seized after sealing and preparing the panchnama. Question is put to this witness in cross-examination that the information received by him has not been noted down, which he admits. In his cross-examination, many questions are put to him, but nothing turns on it.

#. Ratansinh Chhagansinh - PW 5 is examined at Exh. 27, who was Head Constable in the Modasa Town Police Station. He says that Jashwant Fatesinh came and informed the Police Sub Inspector about the information received by him. P.S.I., therefore, informed the Circle Police Inspector and other police personnel. Then, two panchas were summoned and they went to S.T. Stand and ultimately, the accused was arrested. Circle Police Inspector Champaksinh Harisinh Zala has been examined at exh. 39. He says that Police Sub Inspector Vaghela came and informed that Head Constable Jashwantsinh Fatesinh has informed about the information. He verified the same from Jashwantsinh Fatesinh and, therefore, two panch witnesses were called and a watch was arranged. He says that this information was reduced in police station diary. Dy.S.P. was also informed telephonically and thereafter, watch was arranged, the accused was arrested and contraband was seized. This witness has been cross-examined and he says that he had not inquired from, Jashwantsinh Fatesinh about the description of the person who was supposed to come. No description was given to him. It is clear from the evidence of this witness that the information was received by the head Constable has been sent to the Dy.S.P., Bihola only telephonically, but the copy of the information has not been sent as required under Sec. 42(2) of the NDPS Act.

#. Police Sub Inspector Chhatrasinh Motisinh Vaghela has been examined at Exh. 39. He also says that information which was received through Head Constable was entered into the station diary. He says that the panch witnesses were summoned and preliminary panchnama was drawn. Dy.S.P. Mr. Bihola was then "informed" about the same and thereafter, watch was arranged, accused was accosted, searched, muddamal seized and the accused was arrested. He says that after the arrest, FIR was lodged and D.S.P. Sabarkantha was informed about the arrest, seizure etc. by wireless message.

#. The picture that emerges from the above evidence is

that there is non-compliance of mandatory requirement of Sec. 42 of the NDPS Act. The Apex Court in the case of State of Punjab v. Balbir Singh [AIR 1994 SC 1872], held that the provisions of Sec. 42 are mandatory and if they are not complied with, it would affect the prosecution case. Here, the Head Constable Jashwantsinh Fatesinh who received the information has admitted that he has not reduced the information in writing. He has, then, informed the Police Sub Inspector, who in turn, informed the Circle Police Inspector and then, panch witnesses are called, preliminary panchnama is drawn and thereafter entry is made in the police station diary about the information. Superior officer is telephonically informed. However, Sec. 42 of the NDPS Act, if perused, requires that where an officer takes down any information in writing under sub-section (1), he shall forthwith send a copy thereof to his immediate official superior. Now, therefore, requirement of Sec. 42 having not been complied with, the trial would stand vitiated. The Apex Court in the case of Abdul Rashid Ismail Mansuri v. State of Gujarat [2000 SCC Cri. 496] observed that the Investigating Officer cannot wriggle out of requirement of Sec. 42 on a plea that action is taken under Sec. 43 and not under Sec. 42 where seizure was made from an auto-rickshaw in a public place. Considering these pronouncements, the mandatory requirements having not been followed by the investigating agency, benefit has to go to the accused-appellant and appeal deserves to be allowed only on this sole ground of non-compliance of Sec. 42 of the NDPS Act.

##. At this stage, Ms. Datta does not press for a verdict on other contentions raised by her. The appeal therefore, is allowed. Judgement and order rendered by the learned Additional Sessions Judge, Sabarkantha at Himmatnagar in N.D.P.S. Case No. 1/96 is hereby quashed and set aside. The accused-appellant - Ratnabhai Ramabhai Vanzara is ordered to be set at liberty forthwith, if not required in any other offence. Fine, if paid, be refunded.

[B.C. PATEL, J.] [A.L. DAVE, J.]

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